TIMBERMASTER TIMBER COMPLEX (SABAH) SDN BHD

v.

TOP ORIGIN SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ABDUL HAMID MOHAMED JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: S-02-453-2001]
25 SEPTEMBER 2001

CIVIL PROCEDURE: *Injunction - Interlocutory injunction to deliver vacant possession of land - Pre-requisites - Strong and clear case - Special circumstances - High degree of success at main trial of the action - Balance of convenience - Possibility of greater injustice if not granted - Whether damages adequate remedy*

The appellant and the respondent entered into an operator agreement allowing the respondent to carry out manufacturing operations on part of a piece of land (the operator's parcel). The respondent was at all times aware of the appellant's critical financial situation which eventually led to Danaharta, the national asset company, purchasing the non-performing loans granted by various banks to relieve them of their liquidity problem and the appellant was placed under the management and control of special administrators appointed by Danaharta. Pursuant to the powers of the administrators to disclaim onerous contracts the special administrators decided to terminate the said operator agreement. Therefore when the respondent exercised their renewal option under the operator agreement, the appellant was not agreeable and accordingly gave a six months' notice to terminate the operator agreement. The respondent insisted that it had lawfully exercised the renewal option and refused to deliver vacant possession as a result of which the appellant applied for a mandatory interlocutory injunction for vacant possession which was dismissed by the lower court. Thus, this appeal.

Held:
Per Alauddin Mohd Sheriff JCA

[1] It is trite that in an application for a mandatory interlocutory injunction the applicant must show that it has an unusually strong and clear case and special circumstances for the court to grant relief. As this relief would be primary relief of the applicant in the main action, it must satisfy the court that it has a high degree of success at the trial. (p 571 e-f)

[2] It is obvious that at the material time when the respondent sought to renew the lease, the appellant was already under the charge and control of special administrators who thought it was not prudent to renew the same as there was an existing interested third party able and willing to purchase the appellant company. *Albeit* the appellant had a right to terminate the agreement, there are serious issues to be tried which would warrant the grant of the injunction. (p 572 e)

[3] Injunction is an equitable remedy and it is trite that "he who comes to equity must come with clean hands". The respondent had defaulted in rental payments and therefore its claim of acquired rights over the extended period remains an empty claim because of its failure to meet its corresponding duty to pay rentals – its conduct is not at all in keeping with the above quoted maxim and this does not augur well for them. (p 573 d)

[4] The surrounding circumstances of the case suggests strongly that the appellant would be burdened with greater injustice should the injunction not be granted. There is already a ready and willing purchaser of the appellant company which sale, if not allowed to proceed, would result in further deterioration of the appellant's financial position. Danaharta would then be unable to recover its monies and this would jeopardise its efforts to assist other financially distressed corporations. By virtue of the fact that Danaharta was a national asset company, the recovery of Danaharta's monies is of public interest – a very relevant consideration in granting specific relief. (pp 573 h-i & 574 a-d)

[5] On the other hand, the respondent would suffer absolutely no injustice in the event the injunction is granted. The respondent was aware of the appellant's dire financial situation and the consequential risks involved in entering into a commercial contract with the appellant. It would have been foreseeable by the respondent that the appellant would be placed under the control of special administrators who would have terminated any onerous agreements. (p 574 e-f)

[6] In the circumstances of the case, damages would be an adequate remedy to the respondent should it suffer as a consequence of the appellant losing its action. (p 574 h)

[Appeal allowed with costs.]

Case(s) refered to:

Films Rover International Ltd v. Cannon Films Sales Ltd [1986] 3 All ER 722 ***(foll)***

Locabail International Finance Ltd v. Agroexport [1986] 1 All ER 901 ***(foll)***

Tenaga Nasional Bhd v. Dolomite Industrial Park Sdn Bhd [2000] 1 CLJ 695 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 176

Pengurusan Danaharta Nasional Berhad Act 1998, s. 40(1)

For the appellant - Tommy Thomas (S Vanugopal); M/s Ho Chong Yong Vanugopal

For the respondent - YT Woon (Desmon Chong); M/s Szetu Baldev Gan & Assoc

[Appeal from High Court, Kota Kinabalu; Originating Summons No: K24-25-2001]

Reported by K Ganesh

JUDGMENT

Alauddin Mohd Sheriff JCA:

By way of an *inter partes* summons-in-chambers (encl. 7) the appellant (plaintiff in the High Court) applied before the learned judge for a mandatory interlocutory injunction compelling the abovenamed respondent (the defendant) either by themselves or through their servants or agents to deliver vacant possession to the appellant or their authorised agents the lands referred to as the 'operator's parcel' together with the assets/ machineries which were leased to the respondent under the operator agreement dated 23 August 1999 upon the expiry of the said agreement on 14 February 2001 or by such other date as the High Court shall order.

Having heard the above application on 29 May 2001, the learned High Court judge dismissed it with costs. Hence the present appeal before us.

The Factual Background

At the outset, it is pertinent to mention that the above application by the appellant was initiated by the special administrators appointed to the appellant under the Pengurusan Danaharta Nasional Berhad Act 1998 (the Act). The Act was passed by Parliament in 1998 following the economic crisis in 1997. The scope of the Act is to provide for special laws for the acquisition, management, financing and disposition of assets and liabilities by the body called Pengurusan Danaharta Nasional Berhad (Danaharta), the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by Danaharta and for matters connected therewith or incidental thereto.

The appellant and respondent entered into what is called an operator agreement on 23 August 1999. Under this agreement the respondent, a company having experience and expertise in plywood manufacturing agreed to carry out manufacturing operations (activities) on part of the land (the operator's parcel) in the possession of the appellant as specified in the operator agreement, together with the assets/machineries on terms and conditions therein contained.

When the operator agreement was entered into between the appellant and respondent on 23 August 1999, the respondent was fully aware of the fact that the appellant was undergoing a restructuring scheme under s. 176 of the Companies Act as reflected in the preamble to the said agreement. There is no doubt that the respondent was at all material times fully aware of the critical financial position the appellant was in. In the circumstances, it would seem apparent therefore that this operator agreement was a short-term relationship between the parties.

Towards the end of 1999 when the appellant started to default in their loan repayments, Danaharta purchased their non-performing loans granted by various banks to relieve the banks of their liquidity problem and thereupon on 14 December 1999 appointed special administrators to manage the appellant's assets and affairs and to submit a workout proposal to Danaharta.

Under the terms of the operator agreement ie, cl. 2.01.1 the respondent was given an option to renew the lease for a further period of two years. Acting under the said clause the respondent through their letter of 3 August 2000 informed the appellant of their intention to exercise the renewal option.

However in their workout proposal the special administrators to the appellant were of the view that the best option available to the appellant that would maximise the recovery to its creditors is to sell the entire assets of the company to a third party but found that the operator agreement dated 23 August 1999 between the appellant and respondent (under which the premises and the assets of the appellant were leased to the respondent) was onerous to the appellant.

Pursuant to the powers of the special administrators to disclaim onerous contracts of affected persons under s. 40(1) of the Act, the special administrators decided to bring to an end the said operator agreement. It was under these circumstances that the appellant notified the respondent through their letter dated 14 August 2000 that they were not agreeable to the extension and gave a six-month notice to terminate the operator

agreement. Subsequently on 12 January 2001 the appellant wrote another letter to the respondent giving them notice to deliver vacant possession of the operator's parcel and the machineries on 15 February 2001. The respondent replied saying that they have lawfully exercised their option to renew the lease and was entitled to remain on the said land.

In the meantime, the appellant has filed this originating summons seeking a mandatory interlocutory and a permanent injunction ordering the respondent to deliver vacant possession of the operator's parcel together with the machineries upon the expiry of the operator agreement on 14 February 2001.

Appellant's Submission

It is the appellant's main contention that the respondent's right to exercise the renewal option under cl. 2.01.1 is not absolute but subject to the parties mutually agreeing to extend the said agreement under cl. 7.01 and they are entitled under cl. 5.03, to give notice to terminate the said agreement by giving six months prior notice in writing without assigning any reason.

It was further contended by the appellant that based on the relevant provisions of the agreement the non-extension or termination of the said agreement was lawful.

The appellant agreed that in an application of this nature they have to show that they have an unusually strong and clear case and there are special circumstances before the court will grant relief. The case of *Locabail International Finance Ltd. v. Agroexport* [1986] 1 All ER 901 was quoted in support.

Learned counsel for the appellant argued that their chances of success in their main action is extremely high.

In order for the renewal of the said agreement to be effective, the respondent must first show their intention to renew the lease. Notice of such intention shall be given not less than six (6) months before the expiration of the primary period. However, under cl. 7.01 the appellant must also agree to the extension.

When the respondent wrote to the appellant on 3 August 2000 it was merely an expression of their intention to renew the lease. However, by then the appellant was already under the management of the special administrators who then was of the opinion that the said agreement was onerous to the appellant and refused the extension. In any case, there was already a third party who was willing to purchase the appellant company.

Further, the appellant had given notice of termination of the operator agreement pursuant to cl. 5.03. This, according to counsel was proper as each party was entitled to do so without assigning any reason whatsoever.

In the circumstances of this case counsel argued that there are serious questions to be tried.

Respondent's Submission

It is the respondent's submission that they have validly exercised their option to renew the lease and they have the right to be in continued possession of the operator's parcel by virtue of the contractual licence granted under the agreement.

To grant a *quia timet* mandatory injunction for the closure of the respondent's business operations would in effect grant to the appellant their substantial remedy at this early stage. The main consideration in such an application is to achieve a just result between the parties in the interim period before full trial. Counsel argued that in the circumstances of this case damages would be an adequate remedy and there are no serious issues to be determined.

Conclusion

In an application for a mandatory interlocutory injunction the applicant will have to show that they have an unusually strong and clear case and that there are special circumstances before the court will grant them relief. This test was approved by the English Court of Appeal in *Locabail International Finance Ltd. v. Agroexport* [1986] 1 All ER 901. The rationale for this test is simple to understand. Since the relief of mandatory injunction sought in an interlocutory application would be the primary relief of the applicant in his main action, the applicant must convince the court to its satisfaction that he indeed has a high degree of success at the trial of his action.

With this in mind we shall now proceed to see if the appellant has satisfied the test.

We shall begin by referring to the letter from the respondent's solicitors dated 3 August 2000 informing the appellant of their intention to renew the operator agreement in accordance with cl. 2.01. The critical part of the letter reads ... 'our client intend to exercise the renewal option pursuant to cl. 2.01 of the operator agreement'.

We observe that cl. 2.01 consists of two sub-clauses, *viz* 2.01.1 and 2.01.2. Clause 2.01.1 reads thus:

> In consideration of the various covenants herein contained, TMTC agree to ... together with an option to renew the period of this lease for a period of two (2) years commencing on the date next following expiration of the Primary Period ... .

For the renewal to take effect two conditions must be satisfied. First, the respondent must show their intention to renew in accordance with cl. 2.01.2 which reads as follows:

> In order for the Renewal Option to take effect, The Company shall be obliged to give notice of its intention to exercise The Renewal Option by giving notice of its intention to do so to TMTC not less than six (6) months before the expiration of the Primary Period.

It is pertinent to note that under cl. 2.01.2 the respondent merely served notice of their intention to renew the lease. This is apparent from the opening words 'notice of its intention' appearing twice in the said clause.

Second, the appellant must agree to the extension in accordance with cl. 7.01 which reads:

> Unless the parties hereto mutually agree to extend this Agreement, this Agreement shall ..., terminate upon the expiration of the Primary Period.

It is obvious to us by the time the respondent wrote to the appellant ie, 3 August 2000 to intimate to them their intention to renew the lease the appellant was already under the charge of the special administrators who felt that it was no longer prudent to renew the lease as there was already a third party willing and interested to buy the appellant company. The sale would greatly reduce the appellant's financial problems. By a letter dated 14 August 2000 the refusal by the appellant to renew the lease was communicated to the respondent. In the same letter the appellant also informed the respondent that the operator agreement would be terminated six months from the date of the letter. The appellant's right to terminate the said agreement is clearly spelt out in cl. 5.03.

However, we want to make it clear that we are not deciding whether the purported termination of the said agreement by the appellant or the respondent's exercise of the option is valid or not. That is a matter to be decided at the trial, in this case, by the arbitrator before whom the dispute is pending. All we say is that those are serious issues to be tried, meaning that the respondent has crossed the first hurdle. But there are other hurdles to be crossed.

In the course of his argument before us, learned counsel for the respondent took a strong stand and consistently maintained that the respondent had lawfully exercised their option to renew the lease and therefore had acquired rights over the extended period. However upon being asked by this court as to whether the respondent had been consistently paying the rentals in respect of the operator's parcel counsel was hesitant in his reply. When pressed further counsel gave a nimble reply that they were paid. But upon going through the records learned counsel for the appellant confirmed to us that the respondent was in arrears of rental at the rate of RM197,600 per month amounting to RM1,160,900 as at 31 October 2000. Of significant importance is the fact that no rentals were paid since August 2000. This fact was later acknowledged by counsel for the respondent.

We are of the view that the claim by the respondent they have acquired rights over the extended period will remain an empty claim if it is not met by their corresponding duty to pay the rentals. Before the learned judge much have been said about the inequitable conduct of the appellant by the respondent. But sad to say the respondent's conduct is not at all in keeping with the oft quoted maxim 'he who comes to equity must come with clean hands' bearing in mind that injunction is an equitable remedy.

There is another relevant issue we have to consider in this appeal ie, justice of the case. In *Films Rover International Ltd. v. Cannon Films Sales Ltd.* [1986] 3 All ER 722, Hoffman J had this to say:

> ... The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

From the facts and surrounding circumstances of this case we are of the opinion that greater injustice would be caused to the appellant if the mandatory interlocutory injunction is not granted. We say so for the following reasons.

a) There is already a third party ready and willing to purchase the entire shares of the appellant. The third party purchaser was procured after the closure of a nation-wide search for purchasers.

b) The financial position of the appellant would deteriorate further if the sale was not allowed to proceed.

c) Danaharta, the national asset company which had purchased part of the appellant's borrowings would be unable to recover its monies which in turn would place severe financial constraints on its capital resources thus limiting its financial capacity to assist other financially distressed corporations.

d) In this case, the sale of the assets of the appellant are not just private interest. As Danaharta had stepped in the implications of its purchase of the appellant's non-performing loans are of public interest. Consequently the recovery of Danaharta's monies used to purchase the appellant's non-performing loans is even of greater public interest. Public interest is always a relevant consideration in granting specific relief (see *Tenaga Nasional Bhd. v. Dolomite Industrial Park Sdn. Bhd.* [2000] 1 CLJ 695).

In so far as the respondent is concerned we take the view that there would be absolutely no injustice suffered if the interlocutory mandatory injunction is granted. Our reasons are:

a) The respondent was at all material times fully aware of the critical financial position of the appellant.

b) The respondent was aware of the risk of entering into a commercial contract with the appellant.

c) It must have been foreseeable by the respondent when they entered into the operator agreement that the non-performing loans of the appellant was likely to be acquired by Danaharta under the Act and the affairs of the appellant managed by the special administrators and the risk of the operator agreement being terminated as being onerous.

d) The recital in the operator agreement confirms the actual state of knowledge of the respondent at the material time and provides the rationale for the right of the parties to prematurely terminate the operator agreement without giving any reason under cl. 5.03.

Before we conclude we would say that in the circumstances of this case damages would be an adequate remedy to the respondent in case they may suffer in consequence of the appellant losing their action. We notice that in addition to the undertaking given by the appellant themselves as regards damages these is also the undertaking given by Danaharta to the special

administrators appointed to the appellants. The High Court itself had the power to impose further terms on the undertaking as a precondition for the granting of the injunctive relief.

Having given this matter our most anxious consideration, we are unanimous that this appeal must succeed.

The appeal is hereby allowed with costs. The order of the learned judge is set aside.

My learned brothers Mokhtar Sidin and Abdul Hamid Mohamed JJCA agreed with the decision delivered at the conclusion of argument. They have read this judgment in draft and express their agreement with it.